

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

UMB BANK, NATIONAL ASSOCIATION, AS
TRUSTEE,

Plaintiff,

v.

BLUESTONE COKE, LLC F/K/A ERP COMPLIANT
COKE, LLC, THOMAS M. CLARKE, AND ANA M.
CLARKE,

Defendants.

Case No. 1:20-cv-02043-LJL

DECLARATION OF GORDON GENDLER

1. I am Gordon Gendler, Senior Vice President for UMB Bank, National Association (“UMB”), as Trustee, the Plaintiff in this action (“*Trustee*”). I am a resident of the State of Minnesota and have been at all times relevant to this action.

2. I make this declaration in support of Trustee’s Damages Prove Up Summary Judgment Motion based on my personal knowledge. If called upon to do so, I would testify to the following facts:

3. Originally, Wilmington Savings Fund Society, FSB (“*WSFS*”) served as Trustee, Collateral Agent, Paying Agent, Registrar, and Calculation Agent under the Floating Rate Senior Secured Amortizing PIK Toggle Notes Indenture, dated as of January 11, 2017 (the “*Indenture*”).

4. On May 25, 2018, certain creditors filed an involuntary petition under 11 U.S.C. § 303(a) of the U.S. Bankruptcy Code against ERP Iron Ore LLC (the issuer of the Notes) (“*ERP*”).

Iron”), commencing a bankruptcy case in the U.S. Bankruptcy Court for the District of Minnesota styled as *In re ERP Iron Ore, LLC*, Case No. 18-50378 (the “*Bankruptcy Case*”).

5. On July 17, 2018, an Event of Default under the Indenture occurred pursuant to Section 6.01(a)(9)(i)(B) of the Indenture when ERP Iron consented to an order for relief in the Bankruptcy Case.

6. On that same day, all principal and accrued and unpaid interest on the Floating Rate Senior Secured Amortizing PIK Toggle Notes due December 31, 2019 in the aggregate principal amount of \$22,500,000 (the “*Notes*”) was accelerated and became immediately due and payable under Section 6.02(a)(2) of the Indenture.

7. On June 7, 2019, WSFS delivered a written demand to Defendants seeking collection of all payments due from the defendants that, at the time, totaled no less than \$15,207,026.34, consisting of principal, interest, and costs and expenses up to and including May 31, 2019.

8. Upon information and belief, as of November 6, 2019, \$14,838,963 in principal and \$1,814,702.07 in accrued but unpaid interest was due and owing, along with fees and costs incurred by the WSFS and its counsel and agents.

9. On that date, upon information and belief, the Chapter 7 Trustee in the Bankruptcy Case wired \$7,075,942.33 to WSFS per the terms of a settlement agreement.

10. At that time, upon information and belief, WSFS held a balance of \$7,172,611.82 which included the settlement funds plus \$96,669.49 from a final interest payment.

11. On November 12, 2019, WSFS distributed \$6,069,803.31 to the Depository Trust Company (“*DTC*”) for the benefit of the Noteholders. Of that amount WSFS applied, per the Indenture and Notes, \$1,102,808.51 to WSFS’ accrued but unpaid fees and costs, applied

\$4,255,101.24 to principal, and applied \$1,814,702.07 to accrued but unpaid interest. Attached hereto as Exhibit A is a letter from WSFS documenting the above distribution and allocation. Exhibit A is a business record which was delivered by WSFS to the Trustee, was maintained by the Trustee, was issued at the time of the distribution and allocation, was made by WSFS which had knowledge of the distribution and allocation, and was kept in Trustee's ordinary course of a regularly conducted business activity consistent with its regular business practice.

12. Upon information and belief, the fees and costs paid by WSFS from the settlement were for: its fees; the fees and costs of its attorneys in the Bankruptcy Case; and a \$500,000 prepayment of trustee or noteholder fees and costs as a litigation fee holdback, all as provided for under §6.13 of the Indenture.

13. On November 29, 2019, WSFS was removed and UMB was appointed as successor Trustee, Collateral Agent, Paying Agent, Registrar, and Calculation Agent under the Indenture and other related documents, and Plaintiff accepted such appointment, effective January 13, 2020. Attached hereto as Exhibit B are true and correct copies of letters documenting the transition of WSFS to UMB as Trustee. Exhibit B are business records maintained by the Trustee, were issued at the time of the transition of the trustee role, were variously made by WSFS and the Trustee which each had knowledge of the transition, and were kept in the ordinary course of Trustee's regularly conducted business activity consistent with its regular business practice.

14. Upon its acceptance of the transfer in January 2020, the Trustee showed due and owing of \$10,583,861.76 in principal, plus unpaid fees and costs incurred by the Noteholders in the amount of \$372,650.66.

15. In January 2020, WSFS transferred the prepayment litigation holdback balance of \$447,269.25 to UMB. Since that time, UMB has paid its fees and costs, including attorneys' fees and costs, from that amount. The current balance is \$95,239.29.

16. Thereafter, interest continued (and has continued) to accrue at the default rate pursuant to Section 2.12(a) of the Indenture. The Trustee tracked the principal, interest, and other amounts due-and-owing in its internal system, a Microsoft Excel spreadsheet that Trustee has used for many years and found to be reliable and correct in its calculation. Attached hereto as Exhibit C is the Excel Spreadsheet tracking the amounts due and owing under the Notes. Exhibit C is a business record of the Trustee, which was maintained by the Trustee, was issued at the time of the calculation of the amounts due and owing, was made by the Trustee which has knowledge of the total amounts due and owing, and was kept in the ordinary course of Trustee's regularly conducted business activity consistent with its regular business practice.

17. According to the Trustee's records as of May 25, 2021, a total of \$10,583,861.76 in principal and \$1,749,655.34 in interest is now due under the Notes, Indenture, and Guarantee Agreement.

18. Prior to the settlement payment and transfer to the Trustee Noteholders incurred \$372,650.66 in fees and costs to which they are entitled to payment under Section 2.1(c) of the Guarantee and Sections 6.13 and 7.07(b) of the Indenture.

19. I have reviewed unredacted copies of the attached invoices and find them to be proper and correct. Upon information and belief, the Noteholders' counsel, among other things, represented the Noteholders' interests in the Bankruptcy Case, filed necessary claims, analyzed potential claims and prepared filings for, among other things, this lawsuit, negotiated with the Chapter 7 Trustee, negotiated the settlement, and negotiated and executed the trustee transfer. I

am a licensed attorney and have worked as an attorney and default specialist for many years. I have taught commercial law courses at multiple law schools as an adjunct professor for a period of nearly thirty years. I am familiar with the billing rates and practices of many different law firms. I find the attached invoices, and the attached rates and activities listed therein, to be reasonable and similar to other peer firms working on a large bankruptcy and a lawsuit like the present matter.

20. Since UMB took over as Trustee, Chapman has represented the Trustee and has submitted further invoices that I have paid out of the prepayment litigation holdback funds. I have reviewed those invoices, and likewise have determined that the rates and activities listed in them to be reasonable and similar to other peer firms working on a large bankruptcy and a lawsuit like the present matter, and so have paid them when due.

21. Accordingly, as of May 25, 2021, the total amount due and owing under the Notes, Indenture, and Guarantee Agreement is \$12,706,177.10, comprised of \$10,583,861.76 in principal, \$1,749,665.34 in interest, and \$372,650.00 in Noteholder accrued but unpaid fees and costs.

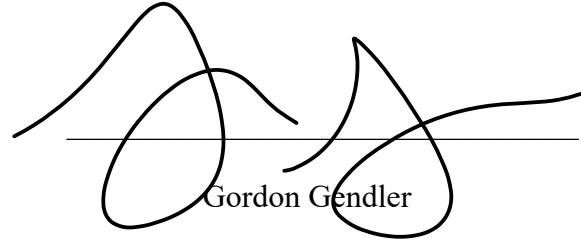
22. Upon information and belief, on January 30, 2017, shortly after the execution of the Indenture and the Guarantee Agreement, Mrs. Clarke and Mr. Clarke delivered a certain Certificate Regarding Value of the Guarantee Shares (the “*Guarantee Certificate*”) to WSFS, the trustee at the time. Attached as Exhibit D is a true and correct copy of the Guarantee Certificate.

23. The Guarantee Certificate, executed by both Mr. and Mrs. Clarke, stated that the value of the Capital Stock “significantly exceeds \$50.0 million and the aggregate principal amount of Notes issued under the Indenture on the date on which such Indenture was executed.”

24. Additionally, in the Guarantee Agreement, Mrs. Clarke and Mr. Clarke made an affirmative representation stating that: “Each of the Guarantors party hereto has executed and delivered a certificate to the Trustee, on behalf of the Holders of the Notes certifying that as of the

date hereof the value of the Guarantee Shares significantly exceeds the aggregate principal amount of Notes issued under the Indenture on the date on which such Indenture was executed.”

25. I declare under penalty of perjury that the foregoing is true and correct.



Gordon Gendler

EXHIBIT A

ALL DEPOSITORIES, NOMINEES, BROKERS, AND OTHERS: PLEASE FACILITATE THE TRANSMISSION OF THIS NOTICE TO ALL BENEFICIAL OWNERS. ADDITIONAL COPIES OF THIS NOTICE ARE AVAILABLE FOR THIS PURPOSE UPON REQUEST AT THE ADDRESS SET FORTH BELOW.

**NOTICE OF ORDER APPROVING THE AMENDED SETTLEMENT OF CLAIMS WITH CHAPTER 7 TRUSTEE
AND SETTLEMENT DISTRIBUTION**

**To the Holders of ERP Iron Ore, LLC (the “Company”)
Floating Rate Senior Secured Amortizing PIK Toggle Notes Due 2019 (the “Notes”)
CUSIP No. 26886EAA1, 26886EAB9, U29511AA7* :**

Wilmington Savings Fund Society, FSB serves as Trustee (the “Trustee”) for the Notes under the Indenture, dated as of January 30, 2017 (as amended, modified and supplemented from time to time, the “Indenture”), by and among the Company, the Guarantors party thereto and the Trustee. The Trustee is communicating with holders of the Notes (the “Holders”) pursuant to the Indenture.

Holders were previously provided notice that on May 25, 2018, an involuntary bankruptcy petition (the “Bankruptcy Case”) was filed against the Company in the United States Bankruptcy Court for the District of Minnesota (the “Bankruptcy Court”) seeking relief under chapter 7 of the United States Bankruptcy Code (the “Bankruptcy Code”). The Bankruptcy Case was converted to one under chapter 11 of the Bankruptcy Code on July 17, 2018. On November 29, 2018, the Bankruptcy Court entered an order converting the Bankruptcy Case to chapter 7 of the Bankruptcy Code effective December 1, 2018.

Entry of Order Approving Amended Settlement of Claims as and against Trustee and Chapter 7 Trustee

Holders were previously provided notice that on December 17, 2018, the Trustee, along with various other parties, as plaintiffs, commenced an adversary proceeding (the “Action”) in the United States Bankruptcy Court for the District of Minnesota against White County, Indiana, Lighthouse Management Group, Inc., as Administrative Agent, and Nauni Jo Manty, solely in her capacity as Chapter 7 Trustee (the “Chapter 7 Trustee”) for the bankruptcy estate of the Company (the “Estate”). On October 22, 2019, the Chapter 7 Trustee filed an Amended Notice of Settlement or Compromise (the “Amended Settlement Notice”), which describes the general terms of a settlement reached between the Trustee and the Chapter 7 Trustee in connection with a settlement of the Action.

Notice is hereby given that on November 6, 2019, the Bankruptcy Court entered an order approving the settlement as described in the Amended Settlement Notice.

Notice of Distribution of Proceeds Received in Settlement of the Action

Please be advised that the Trustee intends to deliver to The Depository Trust Company the amount of \$6,069,803.31 for prompt and equitable distribution to the Holders as of November 6, 2019. Of that amount, \$1,814,702.07 will be applied on account of accrued but unpaid interest, and \$4,255,101.24 will be applied on account of principal, each at the following rates:

* No representation is made as to the correctness of the CUSIP number either as provided on the Notes or as contained herein.

CUSIP*	Total Distribution per \$1,000 of Principal Notes Held on Account of Interest
26886EAA1	\$79.45641277
26886EAB9	\$79.45641277
U29511AA7	\$79.45641277

CUSIP*	Total Distribution per \$1,000 of Principal Notes Held on Account of Principal
26886EAA1	\$186.30886343
26886EAB9	\$186.30886343
U29511AA7	\$186.30886343

Prior to making this distribution, the Trustee deducted certain amounts due and owing to it pursuant to Section 7.07 of the Indenture.

This distribution is in connection with (a) a payment received by the Trustee from Merida Natural Resources LLC (“Merida”) in connection with an agreement entered into by Merida and certain Holders and (b) the receipt of proceeds from the Estate pursuant to the settlement reached between the Trustee and the Chapter 7 Trustee to resolve the claims against one another in connection with the Action and the Trustee’s interest in various other assets of the Estate. Pursuant to the Indenture, the proceeds shall be applied toward payment of amounts due and owing and remaining unpaid in respect of the Obligations (as that term is defined in the Indenture) to Holders, *pro rata*, pursuant to the rate tables set forth above. This is an interim distribution and the Trustee anticipates that it might receive additional amounts on account of the Notes in the future.

The Trustee will continue to communicate with the Holders from time to time, as circumstances warrant. Holders who did not receive a copy of this communication directly from the Trustee and who wish to receive further communications at an address other than the address to which this notice was delivered should contact the Trustee in writing at Wilmington Savings Fund Society, FSB, 500 Delaware Avenue, Wilmington, Delaware 19801, Attn: Geoffrey J. Lewis, Vice President.

Wilmington Savings Fund Society, FSB, as Trustee

Dated: November 12, 2019

EXHIBIT B



DTC TRANSFER AGENT CHANGE REQUEST

To:

FAST

TA SVCS

DDA

Dinesh Hegde

Sharon Pope

Mildred Metzel

Fast_Implementation@dtcc.com

TAServices@dtcc.com

ddachangerequest@dtcc.com

Date:

Transfer Effective Date:

1/13/2020

Security Description:

Floating Rate Sr Sec PIK Toggle due 2019

Issuer:

ERP Iron Ore, LLC

CUSIP(s)

26886EAA1

U29511AA7

26886EAB9

Current Outstanding(s)

\$0

\$0

\$22,838,963

Prior Agent

WSFS Bank

500 Delaware Avenue

Wilmington, DE 19801

Attn: Geoffrey J. Lewis

Phone: (302) 573-3218

T/A: 50235

FINS: 204826

Successor Agent

UMB Bank, N.A.

Attn: Corporate Trust Dept

Bond Operations

928 Grand Blvd., 4th Floor

Kansas City, MO 64106

Attn: Jackie Hemer

Phone: (816) 860-7744

T/A: 50051

FINS: 199109

Check all that apply:

X

Transfers

X

Interest Disbursements

X

Trustee

X

Paying Agent

X

Redemption/Maturity

-

Other

James Nixon

Trust Operations Associate



DTC TRANSFER AGENCY CHANGE FORM

FAST:	*Attn: Angela Orlando	Fast_Implementation@DTCC.com
TA SVCS:	*Attn: Sharon Pope	TAServices@DTCC.com
DDA:	*Attn: Tracy Johnson	tmjohnson@DTCC.com

Security Description: ERP Iron ORE, LLC Floating Rate Senior Secured Amortizing PIK Toggle Notes Due 2019

CUSIP	AMOUNT
U29511AA7	-
26886EAA1	-
26886EAB9	22,838,963.00

Address Change: Yes
Name Change: Yes
CUSIP Change: No

PRIOR AGENT

WSFS Institutional Services
500 Delaware Ave.
Wilmington, DE 19801

Geoffrey J. Lewis
glewis@wsfsbank.com

302-573-3218
FINS # 204826
TA # 50235

SUCCESSOR AGENT


UMB Bank, N.A.
Attn: Corporate Trust Dept, Bond Operations
928 Grand Blvd., 4th Floor
Kansas City, MO 64106

Jackie Heimer
Jacquelyn.Heimer@umb.com
816-860-7744
FINS #199109
TA #50051

Effective Date: 01/13/2020

Special Instructions: None
Transfers: Yes
Dividend/Interest Disb: Yes
Trustee (Bonds): Yes
Paying Agent (Bonds/Cpns): Yes
Redemption/Maturity (Bds): Yes

Attachments: No

Signature: 
Name: Jackie Heimer
Title: Team Manager I
Telephone: 816-860-4659
Email address: Jacquelyn.Heimer@UMB.com

Notification Date: 01/02/2020

EXHIBIT C

ERP Calc of Default Interest Due

Next Payment Date 12/31/19
 Last Payment Date 11/20/19
 Rate 12.0560000% 3M Libor+8% + 2%
 Number of Days 41

Original Outstanding \$ 22,500,000.00
 DTC Fast Balance \$ 22,838,963.00
 Current Outstanding \$ 10,583,861.76

Accrued Interest \$ 145,321.13

Next Payment Date 3/31/20 3M Libor Rate on 12/27/2019
 Last Payment Date 12/31/19 1.94463
 Rate 11.94463000% 3M Libor+8% + 2%
 Number of Days 91

Original Outstanding \$ 22,500,000.00
 DTC Fast Balance \$ 22,838,963.00
 Current Outstanding \$ 10,583,861.76

Accrued Interest \$ 319,562.46

Total Accrued Interest \$ 1,749,665.34

Next Payment Date 6/30/20
 Last Payment Date 3/31/20
 Rate 11.43340000% 3M Libor+8% + 2% Libor Rate on 3/30/2020
 Number of Days 91 1.4334

Original Outstanding \$ 22,500,000.00
 DTC Fast Balance \$ 22,838,963.00
 Current Outstanding \$ 10,583,861.76

Accrued Interest \$ 305,885.19

Next Payment Date 9/30/20
 Last Payment Date 6/30/20 Libor Rate on 6/29/2020
 Rate 10.29610000% 3M Libor+8% + 2% 0.2961
 Number of Days 92

Original Outstanding \$ 22,500,000.00
 DTC Fast Balance \$ 22,838,963.00
 Current Outstanding \$ 10,583,861.76

Accrued Interest \$ 278,485.28

Next Payment Date 12/30/20
 Last Payment Date 9/30/20
 Rate 10.22513000% 3M Libor+8% + 2% Libor Rate on 9/29/2020
 Number of Days 91 0.22513

Original Outstanding \$ 22,500,000.00
 DTC Fast Balance \$ 22,838,963.00
 Current Outstanding \$ 10,583,861.76

Accrued Interest \$ 273,559.55

Next Payment Date 3/31/21
 Last Payment Date 12/30/20
 Rate 10.23750000% 3M Libor+8% + 2% Libor Rate on 12/30/2020
 Number of Days 91 0.2375

Original Outstanding \$ 22,500,000.00
 DTC Fast Balance \$ 22,838,963.00
 Current Outstanding \$ 10,583,861.76

Accrued Interest \$ 273,890.50

Next Payment Date 5/21/21
 Last Payment Date 3/31/21
 Rate 10.20163000% 3M Libor+8% + 2% Libor Rate on 3/30/2021
 Number of Days 51 0.20163

Original Outstanding \$ 22,500,000.00
 DTC Fast Balance \$ 22,838,963.00
 Current Outstanding \$ 10,583,861.76

Accrued Interest \$ 152,961.24

EXHIBIT D

THOMAS M. CLARKE AND ANA M. CLARKE
 c/o ERP Compliant Fuels, LLC
 15 Appledore Lane
 Natural Bridge, Virginia 24578
 Email: Tom.Clarke@kissito.org

CERTIFICATE REGARDING VALUE OF GUARANTEE SHARES.

January 30, 2017

Reference is made to (i) the guarantee agreement dated January 30, 2017, among Thomas Matthew Clarke, Ana Mercedes Clarke, ERP Iron Ore, LLC, ERP Compliant COKE, LLC and Wilmington Savings Fund Society, FSB, as Trustee (the "Trustee") (as amended, supplemented, or otherwise modified from time to time, the "Guarantee Agreement"), and (ii) the indenture dated January 30, 2017, among ERP Iron Ore, LLC (the "Issuer"), the guarantor(s) listed thereunder, and the Trustee (as amended, supplemented, or otherwise modified from time to time, the "Indenture").

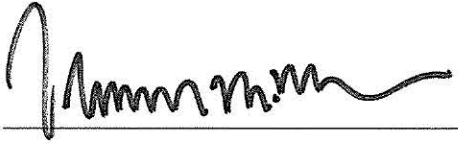
This certificate is delivered to you, Wilmington Savings Fund Society, FSB, as Trustee (the "Trustee") under the Guarantee Agreement, in connection with Section 2.2(b) of the Guarantee Agreement. Capitalized terms used and not otherwise defined herein shall have the meanings assigned thereto in the Guarantee Agreement.

Each of the undersigned hereby certifies that:

- (a) I have read the Guarantee Agreement and understand my obligations therein;
- (b) I understand that the value of the Guarantee on the part of the Limited Guarantor is limited to the value of the Guarantee Shares as of the date hereof;
- (c) the statements herein are based either on my own personal knowledge or on information, data, and/or reports furnished to me by advisors who have knowledge of the facts involved and, in my opinion, I have made such other examination or investigation as is necessary to enable me to express an informed opinion as to the value of the Guarantee Shares; and
- (d) I certify that as of the date hereof the value of the Guarantee Shares, such value being the value of the Limited Guarantor's equity interest in Conuma Coal Resources Limited, Seneca Coal Resources, LLC and Seminole Coal Resources, LLC significantly exceeds \$50.0 million and the aggregate principal amount of Notes issued under the Indenture on the date on which such Indenture was executed.

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IN WITNESS WHEREOF, the undersigned have executed this Certificate as of the date first written above.

By: 

Name: Thomas Matthew Clarke

By: 

Name: Ana Mercedes Clarke

[Signature Page of Side Letter Certificate]